

19
United States
Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington,
Northern Division.

FILED

JUN 21 1923

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. CALDWELL & LYCETTE, Attorneys for
Appellant,

1311 Alaska Building, Seattle, Washing-
ton.

THOMAS P. REVELLE, Esquire, Attorney for
Appellee,

310 Federal Building, Seattle, Washing-
ton.

DAVID SPAULDING, Esquire, Attorney for
Appellee,

310 Federal Building, Seattle, Washing-
ton. [1*]

United States District Court, Western District of
Washington, Northern Division.

No. 11,026.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE RODGERS,

Defendant.

WRIT OF SCIRE FACIAS.

President of the United States of America, to the
Marshal of the Western District of Washing-
ton:

*Page-number appearing at the foot of page of original certified
Transcript of Record.

WHEREAS, heretofore, to wit, on the 24th day of February, 1925, a recognizance and surety bond in the sum of Seven Hundred Fifty Dollars (\$750.00) was executed by the defendant Eugene Rodgers, as principal, and the National Surety Company, as surety, which said recognizance and surety bond was conditioned for the appearance of the said defendant Eugene Rodgers before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the city of Seattle, during the May, 1926, term of said District Court, and from time to time, and term to term, thereafter, to answer a charge of the United States of America exhibited against the said defendant, and not to depart out of the jurisdiction of the court without leave; and that thereafter, on the 28th day of February, 1925, the said recognizance for appearance before the said District Court, and surety bond was filed in said court with the Clerk thereof.

AND, WHEREAS, thereafter, to wit, on the 3d day of January, 1927, and at a proper term of said court, the said defendant Eugene Rodgers being called to come into court [2] and to answer said charge, came not, but made default, whereupon, on motion of United States District Attorney, it was considered by the Court that for the default aforesaid, the said defendant Eugene Rodgers as principal, and the National Surety Company as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty Dollars (\$750.00) according to the tenor and effect of said recognizance and surety bond now

in the hands of the Clerk of said court, unless they appear at the next term of said court, and show sufficient cause to the contrary.

YOU ARE, THEREFORE, HEREBY COMMANDED, to make known the contents of this writ to the said defendant Eugene Rodgers and the National Surety Company, and summon them to appear before said District Court of the United States, at a court to be held before the Western District of Washington, Northern Division, at the courthouse in Seattle, on the 4th day of April, 1927, and to show cause, if any they have, why judgment *nisi* aforesaid should not be made absolute, and further, to show cause why they ought not to have execution issue against them for the respective amounts due to the United States of America, upon said surety bond, under the judgment aforesaid, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

HEREIN FAIL NOT.

WITNESS, the Hon. JEREMIAH NETERER, Judge of the United States District Court, at Seattle, in said District, on the 8 day of March, 1927.

[Seal]

ED. M. LAKIN,

Clerk of the District Court of the United States
for the Western District of Washington.

By T. W. Egger,

Deputy Clerk, U. S. District Court, Western District of Washington. [3]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed *scire facias* on the therein named National Surety Co., by handing to and leaving a true and correct copy thereof with Mr. W. H. Brinker, Agent, personally, at Seattle, in said District, on the 9th day of March, A. D. 1927.

E. B. BENN,

U. S. Marshal.

By J. E. Williams,

Deputy.

Western District of Washington,—ss.

I hereby certify and return, that on the 9th day of Mch., 1927, I received the within writ and that after diligent search, I am unable to find the within named defendant Eugene Rogers within my district.

E. B. BENN,

United States Marshal.

By J. E. Williams,

Deputy United States Marshal.

[Endorsed]: Filed Mar. 10, 1927. [4]

[Title of Court and Cause.]

AMENDED RETURN TO WRIT OF SCIRE
FACIAS.

Comes now the National Surety Company, and making answer and return to the writ of scire

facias heretofore issued herein, and served upon the National Surety Company, admits, denies and alleges as follows, to wit:

I.

This defendant admits that on the 24th day of February, 1925, a surety bond was executed in the sum of \$750.00 with Eugene Rogers as principal and the National Surety Company as surety; but denies that said bond was conditioned for the appearance of said defendant, Eugene Rogers, before the United States District Court for the Western District of Washington, during the May, 1926, term of said District Court, or any other time or times; and this defendant, National Surety Company, further denies each and every other allegation in said writ contained.

For further return and answer to said writ of scire facias, and as a first affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the defendant, Eugene Rogers, complied with each and every term and condition of said bond so executed by him and the National Surety Company, on the 24th day of February, 1925; and that by having complied with the terms of said bond, the same [5] was and is terminated, and there is no liability whatsoever on the National Surety Company or said defendant Eugene Rogers.

For further return and answer to said writ of scire facias, and as a second affirmative defense

thereto, National Surety Company alleges as follows, to wit:

I.

That the bond of the National Surety Company, executed on the 24th day of February, 1925, was a bond given before United States Commissioner R. W. McClellan, and required the appearance of the defendant Eugene Rogers before said Commissioner; that thereafter said Eugene Rogers appeared before said United States Commissioner as required by the terms of said bond, and said Commissioner duly and regularly bound said defendant, Eugene Rogers, over to answer an information to be filed in the United States District Court for the Western District of Washington, Northern Division, and required said defendant Eugene Rogers to file another and final bond; that thereupon, to wit, on the 27th day of February, 1925, said defendant Eugene Rogers did execute a further surety bond in the sum of \$1,500.00, conditioned for the appearance of said defendant Eugene Rogers before the United States District Court for the Western District of Washington, and said bond was thereafter filed in the United States District Court in the above-entitled action, and this defendant was released upon said bond; that by reason of the aforesaid facts the said bond of February 24th, was and is null and void and all liability thereon terminated.

II.

The said final bond so executed by said defendant and filed in the above-entitled action, was not

conditioned for the appearance of said defendant Eugene Rogers before the United States District Court for the Western District of Washington, [6] Northern Division, "during the May, 1926, term of said District Court and from time to time and term to term thereafter," as set forth in the writ of scire facias heretofore issued herein; that said Eugene Rogers was not thereafter, to wit, on the 3d day of January, 1927, at a proper term of said court, called to come into court and answer the charge brought against him, nor was said defendant ever called at any proper term of said court under said bond, nor did said defendant make default at any time under said bond.

For further return and answer to said writ of scire facias, and as a third affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the bond filed in this cause is null and void and of no effect whatsoever, for the reason that the condition of the bond, as it appears upon the face thereof, was that the said defendant, Eugene Rogers, should appear and answer as follows: "on the — day of ——— term, to be begun and held in the City of Seattle in said District on the — day of the present term 1925, and from time to time and term to term thereafter"; that said bond is void for the reason that no definite date is set for the appearance of said defendant.

For further return and answer to said writ of scire facias, and as a fourth affirmative defense

thereto, National Surety Company alleges as follows, to wit:

I.

That said bond was executed on the 27th day of February, 1925; that said bond is, on its face, conditioned for the appearance of the defendant on the — date of the ——— term to be begun and held at the City of Seattle in said district on the — day of the present term, 1925, and from time to time and term to term thereafter, to which the case may be continued; [7] that said Eugene Rogers was not called to appear during said “present term,” nor at any time during said “present term,” nor was said defendant, Eugene Rogers, called during the following term or at any term during 1925, nor at any term during 1926, nor at any time until the 3d day of January, 1927, as set forth in said writ of scire facias herein; that by reason of said facts said Eugene Rogers did not violate the conditions of his said bond, and said defendant was never called at any proper term of said court.

For further return and answer to said writ of scire facias, and as a fifth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the — date 1925 and from time to time thereafter; that after the delivery of said bond, and without the knowl-

edge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words "present term," and by the addition of the words "term to term"; that the said National Surety Company is informed and believes that said additions were made in ink thereon, after the delivery of said bond, by R. W. McClelland the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said changes and alterations, material in character, the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void. [8]

For further return and answer to said writ of scire facias, and as a sixth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That said bond so filed in this cause was and is null and void by reason of the following facts, to wit: that said bond, on its face, provides as follows: That said defendant is required "then and there to answer the charge of having on or about the — day of ——— A. D. 192—, within said district, in violation of section — of the ——— (Act of —) (Criminal Code) (R. S.) of the United States, unlawfully violating the National

Prohibition Act"; that by the terms of said bond this defendant, Eugene Rogers, was not bound to answer any charge of whatsoever kind or nature under the laws of the United States; that by reason of the failure of said bond to provide for the defendant's answering for a definite and known or specific charge under the laws of the United States, said bond was and is null and void and there is no liability whatsoever on the surety, the National Surety Company; that by reason of the foregoing facts said Eugene Rogers was not called to answer any charge and there being no charge mentioned in said bond, said Eugene Rogers did not violate the condition of said bond.

For further return and answer to said writ of scire facias, and as a seventh affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That if the condition of said bond was that the defendant answer to any charge whatsoever against him, then he was only bound by said bond to answer a single charge; that instead of filing a single charge against said defendant, the said plaintiff, United States of America, on the 30th day of September, 1926, filed an information against said defendant in the above-entitled [9] action, in two counts, charging the said defendant with two violations of the National Prohibition Act, to wit, on the first count, unlawfully possessing intoxicating liquors on the 21st day of February, 1925, and on the second count, unlawfully maintaining a com-

mon nuisance by manufacturing and selling intoxicating liquors on February 21st, 1925, at the premises known as 101½ Occidental Avenue, Seattle; that by reason of the plaintiff's having filed more than one charge against the defendant in the above-entitled action and under said bond, the risk of the surety was greatly increased; that by reason of said facts the liability of said surety was and is terminated, and said surety was and is released.

For further return and answer to said writ of scire facias, and as an eighth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That no notice of whatsoever kind or nature was given to the National Surety Company to produce said defendant, prior to the date of forfeiture herein; that said forfeiture was and is premature and improper, in that said action was set for trial on February 8, 1927, and thereafter continued to March 8, 1927, and thereafter continued to March 15th, 1927, all of which dates are subsequent to the date of the alleged forfeiture of said bond.

WHEREFORE, having made its return to the writ of scire facias issued herein, and having fully answered the same, and having shown cause why the judgment *nisi* aforesaid should not be made absolute and why execution should not issue against the National Surety Company for the amount claimed in said writ of scire facias, the National Surety Company prays that judgment absolute be not rendered against it, and that it be relieved from

any and all liability under said bond, and from any and all costs [10] accruing thereunder and that said writ of scire facias be discharged.

CALDWELL & LYCETTE.

CALDWELL & LYCETTE,

Attorneys for National Surety Company.

United States of America,
Western District of Washington,
Northern Division,—ss.

Hugh M. Caldwell, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the National Surety Company, a corporation, and makes this verification for and on behalf of said National Surety Company for the reason that it is a foreign corporation and that there is no officer thereof within the State of Washington upon whom service of process may be had; that he has read the foregoing return to writ of scire facias, knows the contents thereof and believes the same to be true.

HUGH M. CALDWELL.

Subscribed and sworn to before me this 7th day of April, 1927.

JOHN P. LYCETTE,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: This pleading should have been filed on May 10, 1927.

[Endorsed]: Filed May 15, 1928. [11]

[Title of Court and Cause.]

WAIVER OF JURY.

Comes now the National Surety Company, and waives any right it might have to a jury trial herein.

NATIONAL SURETY COMPANY,
By CALDWELL & LYCETTE,

Its Attys.

O. K.—PAUL D. COLES,
Asst. District Attorney.

[Endorsed]: Filed Jun. 13, 1927. [12]

United States District Court, Western District of
Washington, Northern Division.

No. 11,028.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EUGENE RODGERS,
Defendant.

JUDGMENT.

It appearing to the Court from the records and files herein and from the evidence adduced that on the 3d day of January, 1927, the above-named defendant Eugene Rodgers was duly called into this court to answer to the information heretofore filed against him charging him with violation of Sec-

tions 3 and 21, Title II, National Prohibition Act, and that when so called the said defendant Eugene Rodgers defaulted and failed to appear, and that he was duly and regularly summoned from the door of said courtroom three times to appear and answer to said information and again failed to appear; and that thereafter, on, to wit, the 3d day of January, 1927, the recognizance and surety bond which was executed by the said defendant Eugene Rodgers in the sum of \$750.00, which said recognizance and surety bond was conditioned for the appearance of the said defendant Eugene Rodgers before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the City of Seattle, at the next term, to wit, May, 1926, term of said District Court, and from time to time and from term to term thereafter, was upon motion of the United States Attorney duly forfeited and judgment *nisi* thereupon entered defaulting said recognizance and sureties upon said surety bond.

That thereafter, on the 8th day of March, 1927, a writ of scire facias was duly issued out of this court commanding [13] the said Eugene Rodgers, as principal, and the National Surety Company, as surety, to appear before this Court on the 4th day of April, 1927, to show cause why said judgment *nisi* should not be made absolute, and further, to show cause why they ought not to have execution issue against them, and each of them, for the amount due to the United States of America upon said surety bond under the judgment as afore-

said, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment as by law provided, and that the said defendant Eugene Rodgers could not be found, and that service was effected on said National Surety Company, as surety, and that the said writ has been duly returned into this court by the United States Marshal for said district with his return thereon as aforesaid; and an answer to said writ was regularly filed by the Surety Company, and on May 10, 1927, the matter was regularly brought on for hearing before the undersigned, one of the Judges of the above-entitled court for the Western District of Washington, the United States appearing by Thomas P. Revelle, United States Attorney, and Paul D. Coles, Assistant United States Attorney, and the National Surety Company appearing by Caldwell & Lycette, its attorneys; and the Court being fully advised in the premises, it is by the Court—

ORDERED AND ADJUDGED that the said judgment *nisi* entered herein on the 3d day of January, 1927, forfeiting said recognizance and declaring that said defendant Eugene Rodgers as principal, and National Surety Company, as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty (\$750.00) Dollars, according to the tenor and effect of said recognizance and surety bond, be made absolute; and it is further

ORDERED that the Clerk of the above court be, and he hereby is, authorized and directed to issue writ of execution against the property of National

Surety Company, surety upon said surety bond, for the sum of Seven Hundred Fifty (\$750.00) Dollars, [14] together with all costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

Done in open court this 2d day of April, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

The defendant National Surety Company excepts to each and every part of the foregoing judgment, and *tis* exceptions are hereby allowed this 2d day of April, 1928.

EDWARD E. CUSHMAN.

[Endorsed]: Filed Apr. 2, 1928. [15]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, United States Attorney, and PAUL D. COLES and DAVID L. SPALDING, Assistant United States Attorneys, Its Attorneys:

You, and each of you, will please take notice that the defendant, National Surety Company, in the above-entitled cause, has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled court and cause on the 2d day of April, 192 , and from the whole and every part thereof.

Dated this 23d day of April, 1928.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Copy received this 1st day of May, 1928.

D. SPAULDING,
United States Attorney.

[Endorsed]: Filed May 1, 1928. [16]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes the defendant, National Surety Company, and files the following assignments of error upon which it will rely on its prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 2d day of April, 1927.

JUDGMENT.

1. That the United States District Court for the Western District of Washington, Northern Division, erred in refusing to grant the appellant and defendant's motion for a nonsuit.

2. That said Court erred in granting judgment for the plaintiff and respondent.

3. That said Court erred in refusing to grant judgment for the defendant and appellant, dismissing the cause.

WHEREFORE, appellant prays that said judgment be reversed, and that the United States District Court for the Western District of Washington,

Northern Division, be ordered to enter a judgment and order reversing said decision in said cause.

CALDWELL & LYCETTE,

Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed May 1, 1928. [17, 18]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the National Surety Company, a corporation, appellant herein, as principal, and the New York Indemnity Company, a corporation organized under the laws of the State of New York, authorized to transact the business of surety in the State of Washington, and in the District of Washington, as surety, are held and firmly bound unto the United States of America, plaintiff herein, in the full and just sum of Fifteen Hundred (\$1500.00) Dollars, well and truly to be paid, we bind ourselves and our and each of our, heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23d day of April, 1928.

The condition of this obligation is such, that,

WHEREAS, the above-named plaintiff, United States of America, on the 2d day of April, 1928, in the above-entitled court and action, recovered

judgment against the defendant above named in the sum of Seven Hundred Fifty (\$750.00) Dollars; and

WHEREAS, the above-named principal, National Surety Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court, to the United States Circuit Court of Appeals for the Ninth [19] Circuit;

Now, therefore, if the said principal, the National Surety Company, a corporation, shall pay to said plaintiff and respondent, the United States of America, all costs and damages that may be awarded against said National Surety Company, a corporation, on said appeal, and shall prosecute its said appeal to effect, and answer all costs if it fail to make good its plea, and shall satisfy and perform the judgment and order appealed from, in case it shall be affirmed, and shall satisfy and perform any judgment or order which the said United States Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said United States District Court for the Western District of Washington, Northern Division, then this obligation to be void; otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY.

[Seal]

By JOHN P. LYCETTE,

Its Atty.

NEW YORK INDEMNITY COMPANY.

[Seal]

By J. GRANT,

Its Attorney-in-Fact.

The above supersedeas and cost bond on appeal is hereby approved as to form and amount, the Asst. U. S. Atty. having O. K.'ed the same.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed May 1, 1928. [20]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 11, 1927, TO FILE BILL OF EXCEPTIONS.

This matter having come on regularly for hearing on the motion of the National Surety Company for an order extending the time for filing a bill of exceptions in the above-entitled matter, until Saturday, June 11th; and it appearing that there is no objection thereto,

NOW, THEREFORE, IT IS HEREBY ORDERED that the time for filing a proposed bill of exceptions in this cause be, and the same is hereby, extended to and including Saturday, June 11th, 1927.

Done in open court this 9th day of June, 1927.

EDWARD E. CUSHMAN,

O. K.—PAUL D. COLES,

Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 9, 1927. [21]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 10th day of May, 1927, this cause came on regularly for trial before the Honorable E. E. Cushman, one of the Judges of the above court, sitting without a jury; the plaintiff appearing by Thos. P. Revelle and Arthur E. Simon, its attorneys, and the National Surety Company appearing by Hugh M. Caldwell and John P. Lycette, its attorneys, and the defendant Eugene Rodgers not appearing.

Thereupon the following proceedings were had and testimony taken, to wit:

It was stipulated that as the case was triable by a jury, the National Surety Company would have permission to file a written waiver of jury as soon as the case was finished, it being considered that such written waiver was filed prior to the time the case was heard.

Mr. Simon offered in evidence the bond in the above case, to which an objection was made that it was not the bond on which the writ of scire facias was brought, the writ being brought on the bond executed on the 24th of February, 1925. Thereupon the Government moved to amend the motion for writ of scire facias and the writ of scire facias, changing the date alleged from the 24th to the 27th day of February, 1925, to which an objection was made [22] on the ground that the writ referred

to the bond executed on the 24th and not the 27th, and on the further ground that the bond of February 24th mentioned in the writ is on file and that the answer filed to that bond had not been controverted and nothing done. Mr. Simon explained that the bond dated February 24th was a commissioner's bond, and through clerical error the date of that bond was taken rather than the date of the final bond. The Court thereupon overruled the objection and permitted the amendment to be made, stating: "Now, if there is no further amendment of the writ asked—" to which Mr. Simon stated: "No further amendment is asked."

Mr. LYCETTE.—Allow us an exception.

The COURT.—Exception is allowed.

The Court thereupon granted the defendant the right to file an amended answer, and an amended answer was filed. Thereupon the Government offered the bond in evidence as Plaintiff's Exhibit 1, to which an objection was made on the ground that it was not the bond mentioned in the writ; objection was overruled, and the bond received as Exhibit 1.

It was admitted that the National Surety Company executed this bond, and that it was filed February 28, 1925, with the Clerk. Thereupon the Government read into the record Clerk's docket in cause No. 11028 as follows: "Line one, September 30, 1926, filed information; Line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the Government rested. Thereupon the defendant moved for a nonsuit on

(Testimony of John P. Lycette.)

the ground that the Government's case showed affirmatively that there was no cause of action, and also showed affirmatively that there was a good defense to the action. The motion was denied.

Thereupon the National Surety Company offered in evidence lines 2, 3, and 4 of the Clerk's docket, line 4 being "January 3, 1927, enter order for trial February 8th, 1927." Lines [23] 3 and 4 were admitted in evidence. Line 7, reading "February 8, 1927, entered order trial March 8, 1927"; line 11, reading "March 9, 1927, entered order trial March 15th at foot of calendar"; line 14, reading "March 15, 1927, entered order, cause over term," were all admitted in evidence.

It was stipulated that the entry that the defendant was called on the 3d day of January, 1927, is the only time he was called, if at all.

TESTIMONY OF JOHN P. LYCETTE, FOR
DEFENDANT.

JOHN P. LYCETTE, sworn as a witness for the defendant, testified: My name is John P. Lycette. I am one of the attorneys for the National Surety Company and handled the bail bond forfeitures. That preparatory to filing a return in this action I investigated the records of the National Surety Company, at the office, and found that the bond issued by the National Surety Company originally did not have the written words "Present term" or "term to term." That so far as the office which executed the bond is concerned, no authority was

(Testimony of John P. Lycette.)

given to put in these words. That the words appear to be in the handwriting of the United States Commissioner; that my judgment is formed by what appears in the commissioner's handwriting on the instrument; that I am not familiar with the commissioner's handwriting other than his name on the bond; that said words were not on the bond when it left the office, nor were they put on with our consent; that our company keeps copies of most of the bonds; the bonds are set up in the home office; they have a form which shows the condition of the bond, the dates, and so on, on the face of it, a sort of skeleton affair. I examined the girl in the office where the bond was written, and whatever records she had, to determine that the words were not on the bond, but I cannot remember the exact records I looked at. That was some time ago.

On cross-examination the witness testified that when [24] the bond left the office it was blank, in the spaces had been filled in the words "present term"; that the bonds as written have no place to add the words "term to term"; an original bond issued by the National Surety Company with the words printed in "term to term," and when they desired to use a bond of that nature they used the printed form containing the words "term to term." I do not know whether the alteration was made prior to the filing of the bond with the commissioner, or not, except that it was made after it left the defendant's office. I do not know the exact date the words were put in except as I have testi-

(Testimony of John P. Lycette.)

fied—that is, when the bond left the office it contained a blank space, in which now are written the words ‘term to term.’”

Witness excused.

Thereupon the information filed in the case was offered in evidence as Defendant’s Exhibit “A-2.” The defendant thereupon rested, and the Government had no rebuttal. Thereupon an extended argument was had, at the end of which the Court rendered judgment for the plaintiff and made the forfeiture absolute. An exception was allowed to this ruling.

This bill of exceptions contains in substance all the testimony offered in this case. The National Surety Company prays that this, its bill of exceptions, be allowed, settled and signed.

CALDWELL & LYCETTE,

Attorneys for National Surety Company.

Settled and allowed this 11th day of July, 1927.

EDWARD E. CUSHMAN,

District Judge.

Copy of bill of exceptions received this 11th day of June, 1927.

THOS. P. REVELLE.

[Endorsed]: Lodged Jun. 11, 1927.

[Endorsed]: Filed Jul. 14, 1927. [25]

No. 11,028.

GOVERNMENT'S EXHIBIT No. 1—AD-
MITTED.

FINAL RECOGNIZANCE OF DEFENDANT.

United States of America,
Western District of Washington,
Northern Division,—ss.

BE IT REMEMBERED, that on this 27 day of February, A. D. 1925, before me, a United States Commissioner for the said Western District of Washington, Northern Division, personally came Eugene Rogers, principal, and National Surety Company, sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of Seven Hundred Fifty and no/100 Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this recognizance is such, that if the said Eugene Rogers, principal, shall personally appear before the District Court of the United States in and for the Western District of Washington, on the — day of the ——— term, to be begun and held at the City of Seattle, in said District, on the — day of present term 1925, and from time to time, thereafter to which the case may
term to term

be continued and then and there answer the charge of having, on or about the — day of ———, A. D. 192—, within said District, in violation of

Section _____ of the _____ (Act of _____)
(Criminal Code) (Revised Statutes) of the United
States, unlawfully violating the National Prohibi-
tion Act, and then and there abide the judgment
of said Court, and not depart without leave thereof,
then this recognizance to be void, otherwise to re-
main in full force and virtue.

[Seal] EUGENE ROGERS, [Seal]
Principal.
NATIONAL SURETY COMPANY. [Seal]
By C. B. WHITE, [Seal]
Attorney-in-fact.

Taken and acknowledged before me on the day
and year first above written.

[Seal] ROBT. W. McCLELLAND,
United States Commissioner as Aforesaid. [26]

[Endorsed]: Part of Commissioner's Transcript.
Court No. 3000. Filed Feb. 28, 1925. [27]

EDWARD E. CUSHMAN,
United States District Court.

68
11028.

Title of Case. Attorneys.

THE UNITED STATES }
 } For U. S.:
 } For Defendant:
 } vs.
EUGENE RODGERS. }

Violation of National Prohibition Act.

* * * * *

Date			PROCEEDINGS.		Line
Month.	Day.	Year.	Filed Information	Govt. Ex. 2)	1
Sept.	30	1926.	Ent. Order forfeiting bail		
Jan.	3	1927.	and for bench warrant.	") Adm.	2
"	3	"	Issued bench warrant. Bail		
			\$1500.00.	Deft. A-1 adm.	3
Jan.	3	"	Ent. order for trial Feb.		
			8, 1927.	A-1 "	4
Feb.	8	"	Ent. order trial over to		
			March 8, /27.	A-1 adm.	7
Mar.	9	"	Ent. order trial over March		
			15, at foot of Calendar.	A-1 adm.	11
"	15	"	Ent. order cause over term.	A-1 adm.	14

[28]

DEFENDANT'S EXHIBIT "A-2" — AD-
MITTED.

(Wash. No. 2625.)

(Commr's No. 3000—Bail \$750.)

United States District Court, Western District of
Washington, Northern Division.

May, 1926, Term.

No. 11,028.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE RODGERS,

Defendant.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 30th day of September, 1926, in the same term,

and for the said United States gives the Court here to understand and be informed that: [29]

COUNT I.

That on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, EUGENE RODGERS, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, two (2) pints and two-thirds ($\frac{2}{3}$) of a pint of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said EUGENE RODGERS, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said EUGENE RODGERS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [30]

And the said United States Attorney for the said

Western District of Washington, further informs the Court:

COUNT II.

That EUGENE RODGERS, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, and at a certain place situated at 101½ Occidental Avenue, known as the Kentucky Bar, Seattle, Washington, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said EUGENE RODGERS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

PAUL D. COLES,

Assistant United States Attorney.

[Endorsed]: Filed Sep. 30, 1926. [31]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript on appeal herein consisting of—

1. Writ of scire facias.
2. Amended return to writ of scire facias.
3. Waiver of jury.
4. Bill of exceptions with exhibits attached thereto.
5. Order extending time for filing bill of exceptions.
6. Judgment.
7. Notice of appeal.
8. Citation on appeal.
9. Assignments of error.
10. Supersedeas bond on appeal.
11. This praecipe.

CALDWELL & LYCETTE,
Attys. for Appellant.

NOTICE.

Attorneys will please indorse their own filings,
Rule 11.

[Endorsed]: Filed May 12, 1928. [31½]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 31, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's Fees (Act Fe. 11, 1925) for making record, certificate or return, 65 folios at 15¢	\$ 9.75
Certificate of Clerk to Transcript of Record, with seal50
<hr/>	
Total	\$10.25

I hereby certify that the above cost for preparing and certifying record, amounting to \$10.25, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of May, A. D. 1928.

[Seal]

ED. M. LAKIN,

Clerk United States District Court, Western District of Washington,

By S. E. Leitch,

Deputy. [33]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, PAUL D. COLES and DAVID L. SPALDING, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, to be held at the City of San Francisco, State of California, in the Ninth Judicial Circuit, within thirty days from date hereof, pursuant to a notice of appeal filed in the office of the clerk of the above-entitled District Court, appealing from the final judgment signed and filed herein on the 2d day of April, 1928, wherein the United States of America is plaintiff and the National Surety Company, a corporation, is defendant and appellant; to show cause, if any there be, why the judgment rendered against the said appellant as in said notice of appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Northern Division, this 1st day of May, 1928.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge.

Received copy 5/1/28.

D. SPAULDING.

[Endorsed]: Filed May 1, 1928. [34]

[Endorsed]: No. 5498. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 21, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

